

« What are the expectations and the needs of justice users: the experience of Polish Ombudsman.»

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Justice and its proper functioning are undoubtedly among the most relevant indicators of the condition of a state. If we look at Polish achievements in this field within the last fourteen years, we may conclude that Poland has made no breakthrough - on the contrary, the situation has deteriorated in terms of the courts' efficiency in considering cases. Thus, taking justice as an indicator of the condition of the state, one may legitimately claim that one of the fundamental civil rights - the right of citizens to a good state - is not observed.

There are a number of reasons for that, and the Ombudsman - the institution set up to investigate whether the public authorities do not violate civil rights, guaranteed by the Constitution, international agreements and other acts of generally binding law - is keenly aware of them as they can be inferred from the letters he receives. The institution of the Polish Ombudsman, which was established towards the end of the Communist period, in 1987 (the law of 15 July 1987; launch of Ombudsman's activity - 1 January 1988), has been equipped with a wide scope of competences - one of the widest in Europe and the world, also in relation to the judiciary. The issue of mutual relations between the Ombudsman institutions and the judiciary was, by the way, the subject of a recent international Ombudsmen's conference organised by the Council of Europe Commissioner for Human Rights, Mr Alvaro Gil and the Norwegian Ombudsman. The Polish Ombudsman, who can be addressed by „every person” (thus, not only a Polish citizen, but also a foreigner remaining within the jurisdiction of the Polish state), has a whole range of legal measures at his disposal that create relationships with courts and tribunals. To mention the most important of them, the Ombudsman can:

- appeal to the Constitutional Tribunal against laws and other acts of generally binding law which do not comply with higher legal norms, and intervene in the CT proceedings if a constitutional claim has been made by a citizen;
- institute proceedings in civil matters (in a broad sense of the word, thus, covering labour law and economic law) and participate in them, with the right of appeal for cassation to the Supreme Court;
- appeal to the Supreme Court for cassation of valid sentences in criminal matters;
- participate in administrative proceedings, institute them and - what is important from the Ombudsman's point of view - appeal against the decisions of public administration bodies, with the right to lodge complaints to the administrative court;

- in order to ensure the uniformity of judicial decision (interpretation and application of law), the Ombudsman can request the so-called abstract resolutions from the Supreme Court and the Supreme Administrative Court.

The Ombudsman relatively rarely avails himself of judicial measures at his disposal, usually when persuasive methods fail to produce a result which would satisfy him or the citizen turning to him for help. Most commonly, on perceiving errors in the functioning of public administration, the Ombudsman will issue recommendations to the relevant authorities, pointing to the violation of human and civil rights. The Ombudsman usually acts on receiving complaints from citizens (about 55,000 a year; until the end of November 47,000 complaints were lodged at the Ombudsman Office), though he also has the right to act *ex officio*.

I think it is a good idea to give you a short outline of the judiciary structure in Poland. Under Article 175 of the Polish Constitution, the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, military courts (both supervised by the Supreme Court) and administrative courts. In the last category, a number of relevant changes will be implemented as of 1 January 2004, so as to achieve full compliance with the Constitution. >From then on, the principle of two instances will also apply to administrative courts. At the moment, the Supreme Administrative Court is the only administrative court in Poland, and only a number of specified bodies, including the Ombudsman, have the right of extraordinary appeal to the Supreme Court against its rulings. In two months' time, the connection between the administrative judiciary and the Supreme Court will be abolished, as regional administrative courts will act as first instance in administrative matters, while the Supreme Administrative Court will become a court of appeal. The Constitutional Tribunal is another organ of the judiciary, which decides on the compliance of laws and other legal acts issued by the central authorities with the Constitution, and handles cases brought by citizens on the basis of constitutional claim.

Article 45, section 1 guarantees every person the right to a fair and public hearing of their case, without undue delay, before a competent, impartial and independent court. It is precisely the implementation of this provision that, in the opinion of the Ombudsman, is far from satisfactory and fails to meet the expectations of citizens. The main part of my report, therefore, will be based on the complaints of citizens and will focus on such issues as protraction of proceedings, high costs of proceeding, access to free legal assistance and the rights of victims of crime. I will mostly cover the period of 2000-2003, the term of the present Ombudsman, Prof. Andrzej Zoll.

Even though we have well formulated normative regulations and provisions granting citizens the right to court, to a fair and public hearing and to legal protection (the right to court has been guaranteed not only by Article 45, but also by other provisions of the Constitution, as well as a number of ordinary laws), in practice, access to court and the standards defined in Article 45 are illusory. While the legal framework meets all the international standards, the vindication of claims by citizens is in many cases difficult, to say the least. The

main diseases of court proceedings include a very long duration period, which results with the so-called protraction of proceedings, and inefficient executive proceedings. A disastrous state of the Polish judiciary is caused, first of all, by difficult working conditions of Polish courts and inadequate financing of the judiciary from the state budget. The number of judges working in courts is still far too low. Numbers and figures do not lie: while the influx of cases increased from 2,006,000 to 8,696,913, that is by 333.5%, in 1989-2002, the number of posts for judges and associate judges grew just a little over 80%.

The period covered in this paper has been marked by considerable changes: the material jurisdiction of common courts has been extended to include deciding on petty offences (as the boards dealing with them have been liquidated) and drunken driving. Also, the National Court Register has been set up with the responsibility for registration of business entities. The above-mentioned changes, introduced within the period of 10 months, imposed new tasks on courts and judges and resulted in an additional one million cases to be considered. This is one of the reasons why the number of cases soared so dramatically in 1989-2000, an escalation of crime in Poland being another contributing factor.

In recent years, the Ombudsman has been focusing on the citizen's right to have his case considered by the court without undue delay. In his letters to the Minister of Justice, he has repeatedly pointed out that a growing number of protracted proceedings results in a massive influx of applications to the European Court of Human Rights in Strasbourg. Polish citizens most frequently complain about the breach of Article 6 section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the provision guaranteeing that everyone is entitled to a fair and public hearing "within a reasonable time". In a vast majority of cases considered by the Court in Strasbourg, the judgements were favourable to the claimants. As the Ombudsman observed in 2000, in Polish law, there are no remedies available to parties if no court proceedings have been started. The law on the structure of common courts provides for the supervision of individual judges by the chairman of the court in order to stimulate their efficiency and avoid situations when the court stays idle for up to several years, however, this is not sufficient. In his letters of intervention to the Minister of Justice, the Ombudsman expressed an opinion that granting the citizens an adequate legal remedy to combat the idleness of courts would be a better and more effective solution. His opinion was confirmed by the ruling of the ECHR in the famous *Kudla vs. Poland*, where Poland was found guilty of violating not only Article 6 (the protraction of proceedings), but also Article 13 of the Convention, as the Polish legal system did not provide citizens with an effective remedy to be applied in the case of protraction. Soon after the ruling, the Ombudsman addressed the Minister of Justice again, asking whether his department was going to take account of the recommendations of the ECHR and introduce such a remedy into the Polish legal order. The Ombudsman also expressed his concern that a further delay in its introduction might result in an increasing number of cases being referred to Strasbourg. Sadly, his subsequent interventions failed to produce a desirable effect and ensure compliance with Article 45 of the Polish Constitution and Article 6 of the Convention. In 2002, some legislative works

were initiated on a relevant draft law, however, in the face of heavy criticism of the solutions suggested therein, its most important points had to be redrafted. Some days ago, the first reading of draft amendments to the Civil Code took place in the parliament. The amendments will make it possible for citizens to claim damages for erroneous decisions of the state organs, including judges, unfortunately, they do not include the "protraction claim", which has been postulated for a number of years. The authors of the amendments promise in the near future to draft a separate law dealing with the consequences of the protraction of court proceedings and the related right to compensation.

In their complaints addressed to the Ombudsman, Polish citizens have also made a point that the protraction of court proceedings is often caused by long periods of waiting for experts' opinions, especially those from police laboratories. In response to the Ombudsman's intervention of August 2002, the Minister of Justice blamed the long waiting periods on the lack of sufficient resources to improve the work of laboratories, and some organisational problems which needed to be addressed. He promised that by the end of 2003, the waiting period for police laboratory examinations would have been limited to 3 months.

Unfortunately, the protraction of court proceedings is not the only reason why Polish citizens find it extremely difficult to exercise their right to judicial protection. The costs of asserting one's rights before the court are enormous, and it is not only the poorest who cannot afford them. In his letters to the Minister of Justice of 2001, the Ombudsman pointed to the wrong practices of civil courts in the area of granting exemptions from costs to natural persons. Under Polish law, those who want to apply for exemption from costs have to submit a declaration that they not able to incur them without seriously impairing their ability to support themselves and their families. The declaration should include detailed information on the applicant's family status, his property and income. Should the court considering the application have any doubts concerning the truthfulness of the information provided, it can order an additional investigation. However, citizens often complain that courts fail to make use of that possibility, automatically considering the declaration as unreliable and rejecting the application. As a result, the party is usually unable to assert his or her claim before the court. This, in the opinion of the Ombudsman, causes a violation of the right to a fair and public hearing, guaranteed by the Constitution and the Convention. One of the cases considered by the Court of Human Rights (*Kreuz vs. Poland*) has further enhanced the Ombudsman's point of view. The Minister of Justice has agreed that the practice is a wrong one and should be modified. Courts have also frequently refused to appoint a defence counsel for those who have documented the lack of resources to engage one themselves. The problem of exceeding costs does not only relate to individuals, but - what is interesting - also to the Polish state. The Ombudsman once raised the issue of court-appointed counsels' fees which had not been paid. The tight budget of the Ministry of Justice made it only possible to make the due payments in the following budget year. This phenomenon, however, epitomises a much broader problem, namely the fact that the present system of appointing counsels and attorneys does not work properly. Some legislative changes are necessary here.

I am deeply convinced that one of the most important challenges facing the Polish justice system is to strengthen the position of the victim in criminal proceedings, to ensure his or her appropriate protection and the possibility to claim compensation for injury suffered as a result of crime. In this area, there is no adjustment of Polish regulations to those of the EU. The European Convention on Compensations of the Victims of Violent Crimes of 1983 has not been ratified yet. Work on the draft law on the state compensation fund for the victims of crime has taken much too long, and the versions of the draft produced so far are unsatisfactory. The Ombudsman has repeatedly insisted on the necessity of creating a National Program of Assistance to the Victims of Crime. A plenipotentiary for the victims of crime has been appointed at the Ombudsman's Office, and his mandate includes not only providing assistance to those who have suffered from crime, but also stimulating the establishment of associations and other organisations offering support to the victims. The Ombudsman considers mediation as a very important instrument recently introduced to Polish criminal law. In his interventions, he has emphasised that it is necessary to shape the legal provisions and practice in a way that will enable institutions and citizens to make a wide use of the opportunity thus created to settle conflicts between the offender and the victim outside the court. An extended use of mediation in criminal proceedings might guarantee the compensation of the victim by the offender and make it possible to avoid long and costly civil proceedings. The Ombudsman has organised a large conference, bringing together the NGOs involved in mediation as well as prosecutors and judges, who are competent to decide if mediation should be applied in a given case. The Ombudsman has also expressed his concern about some irregularities in preparatory proceedings instituted by the public prosecutor in cases related to road accidents or medical error. Though extremely important for citizens and the protection of such basic values as life and health, those proceedings were carried out without due diligence, often basing on incomplete or unclear experts' opinions, failing to examine all available evidence, with no respect for the rights of the victims. The Ombudsman was often forced to intervene in such cases, asking the appellate prosecutors or the National Prosecutor's Office to take certain measures in order to complete preparatory proceedings.

In the introductory part of my presentation, I listed the judicial competences granted to the Polish Ombudsman. I want to stress that, in my opinion, they are of great importance as they contribute to a better and more efficient protection of citizens, also in situations when a violation of substantive or procedural law has occurred as a result of court ruling. Every year, the Ombudsman makes dozens of appeals for cassation to the Supreme Court (and he receives about 2000 requests a year), most often related to valid sentences of common courts in criminal proceedings (79 cassations in 2000, 54 in 2001, 71 in 2002, 40 until the end of November 2003). A number of them had a historical background, for example cassations overturning the convictions of trade union activists under martial law or members of the Jehovah Witnesses community circulating their publications in the 1950s and 1960s. Some of the cassations were based on the European Convention of Human Rights (Article 6, section 1 and 3c), as provided by Article 91 section 2 of the Polish Constitution, and related to cases where the defendant was deprived of liberty and denied a defence counsel.

Other violations pointed to by the Ombudsman as the grounds for cassation included deprivation of the right to defence or breach of the prohibition of *reformationis in peius*.

The present Ombudsman, Prof Andrzej Zoll, attaches great importance to the cooperation with civil society organisations. Some of them, such as the associations operating within the framework of Citizen Consultancy Offices, play a vital role in citizens' awareness raising and provide legal, psychological or organisational assistance to those who need it. The Ombudsman makes considerable efforts to activate elderly people, retired lawyers, who could find their own fulfilment helping others. The Ombudsman also offers his patronage to the so-called law clinics, where the students of law, supervised by their academic teachers, provide free legal advice, thus helping poor citizens who cannot afford a lawyer. The law clinics do not complain about the lack of customers, which points to an insufficient number of solicitors and exceedingly high costs of professional legal advice. To remedy this, a draft law has been presented at the parliament by one of the Polish political parties together with the "Fair Play" Association, formed by those who have failed the extremely difficult and often unfair exams organised by professional corporations of barristers, solicitors and notaries public. The "Fair Play" Association argues that if the exams were run by the state instead of professional corporations, as suggested in the draft law, the number of solicitor would grow (there is one solicitor per 1500 citizens in Poland nowadays, while in Holland the proportion is one per 500), and their fees would go down.

Since work on the draft law is still continuing, and the influential circles of barristers and solicitors are lobbying against it, professional assistance which is offered free of charge by law students at the clinics is of great value not only for the citizen, but also for the Ombudsman. He has signed a number of contracts with the law clinics all over the country, and they provide him with regular information on the violation of human and civil rights in their regions, which makes it possible for him to intervene quickly and effectively.

Unfortunately, the legislature significantly contributes to the deteriorating condition of the Polish judiciary. Citizens have long ceased to be able find their way the maze of ambiguous and imprecise regulations churned out by the Polish parliament. In recent years, the Official Journal of the Republic of Poland has exceeded 15 thousand pages a year, and there are a number of situations where a legal act has been amended several times within one year, even before its entry into force. Coping with the regulations which are often contradictory and mutually exclusive poses a problem even for lawyers, including judges and public prosecutors, who are responsible for the application of law.

The new law on the structure of common courts has introduced the institution of an assistant judge, which raises hopes that the efficiency of judges will improve. On the one hand, this solution is meant to address the unemployment among young law graduates, who leave universities by thousands every year, on the other hand, it should relieve the overburdened judges. The tasks of assistant judges will include drafting orders preparing the case to be considered in trial

or in a sitting of the court, drafting decisions which do not terminate the proceedings as well as their justification, monitoring efficient, appropriate and prompt implementation of the judge's dispositions by the secretariat, asking people and institutions for necessary information, watching over prompt preparation of experts' opinions, preliminary analysis of the dossiers submitted to his division, preliminary analysis of claims included in appeals and even drafting final decisions and orders. If the new institution proves viable, judges will be able to focus on deciding cases, which will, hopefully, result in a lower number of cases overdue.

Numerous changes in the criminal and civil proceedings are also being introduced with a view to accelerating the work of justice system institutions, both at the stage of jurisdiction proceedings and the preceding preparatory stage (e.g. work of the public prosecutor).

The Ombudsman's efforts to improve the work of the justice system also include other areas, however, the length my presentation is limited, and I am not able to cover them all. Still, the number of received complaints about the functioning of the judiciary indicates that, as Prof. Zoll formulates it, "justice is a rotten pillar in the nave of the state". The indolence of the Polish judiciary has also been noted abroad and has caused some concern to the European Commission, which has been reflected in the reports on Poland's preparation for membership published every year. I sincerely hope that lessons learnt at international meetings devoted to better functioning of the judiciary and more effective enforcement of the citizens' right to court will find reflection in the legal order of each country, including Poland.